IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 84

IN THE MATTER

of

ALBERT MARTIN COHEN,

Petitioner,

DENIS M. HURLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT, JOINTLY OR IN THE ALTERNATIVE

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Petitioner, Albert Martin Cohen, a New York attorney, by writ of certiorari granted by this Court, has been allowed review of an order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, disbarring him from the practice of law for professional misconduct. The Court of Appeals of New York affirmed the order of disbarment. The misconduct found was that Cohen hindered and impeded a judicial inquiry that had been ordered by the Appellate Division (a) by refusing to answer questions concerning his professional conduct, which were relevant to the inquiry and (b) by refusing to produce relevant records set forth in a subpoena *duces tecum* served upon him.

Statement

Since petitioner claims that New York acted arbitrarily in disciplining him, a statement of the essential facts and the procedure followed is in order.

The genesis of this proceeding is a judicial inquiry undertaken by direction of the Appellate Division, Second Department. Advised by the Brooklyn Bar Association's petition (presented after its own investigation) of serious abuses and unethical practices by attorneys in Kings County* with respect to their procurement of negligence cases on a contingent basis and with respect to their prosecution of such cases, the Appellate Division in the exercise of its inherent and statutory power and duty (N. Y. Const., Art. VI, Sec. 2; Judiciary Law, Sec. 90; *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465), ordered a judicial inquiry.

The inquiry was ordered with respect to the alleged illegal, corrupt and unethical practices and with respect to the alleged conduct prejudicial to the administration of justice by attorneys and others acting in concert with them, in Kings County. The purpose of the inquiry is to expose all these evil practices with a view to enabling the Appellate Division, to adopt appropriate measures to eliminate them and to discipline those attorneys found to have engaged in them. (For a more complete discussion of the origin of the inquiry, its breadth and scope, see Brief for Appellee, pages 3-, *Anonymous* v. *Baker*, 360 U. S. 287. This Court has already had occasion to consider the work and problems of this judicial inquiry on four other occasions: *Anonymous* v. *Baker*, *supra*; *Anonymous No. 14* v. *Arkwright*, cert. den., 359 U. S. 1009; *Anonymous Nos. 16 and 17* v. *Arkwright*, cert. den., 359 U. S. 1009; *Anonymous (No. 1)* v. *Hart*, cert. den., 359 U. S. 953. For that reason

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* The County of Kings of the State of New York and the Borough of Brooklyn of the City of New York are co-terminus.

no further statement of the purpose or scope of the inquiry is here required.)*

Rule 3 of the Special Rules Regulating the Conduct of Attorneys promulgated by the Appellate Division, Second Department, provides that an attorney who enters into contingent-fee agreements for his services in personal injury, wrongful death, property damage, and certain other kinds of cases, must file statements as to such agreements with the court and, if he enters into five or more such agreements in any year, he must give to the court in writing certain particulars as to how he came to be retained. This Rule was adopted as the result of previous judicial inquiries.

During the period 1954 to 1958, inclusive, pursuant to the provisions of said Rule, petitioner, a specialist in negligence cases, filed 228 statements as to retainer in his own name. In addition, 76 such statements were filed in the firm name of Cohen & Rothenberg, thus indicating that petitioner and his law firm had been retained on a contingent basis in a total of 304 negligence cases in five years (R. 33-35). The inquiry therefore deemed it advisable to call petitioner as one of its witnesses.

Petitioner's Testimony at the Additional Special Term.

Petitioner was duly subpoenaed to testify and to produce his records with respect to such cases before the Justice designated by the Appellate Division to conduct and pre-

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* A public report of the inquiry's findings shows that serious abuses and unethical practices abound in the negligence field in Kings County (N.Y.L.J., June 23, 1958, p. 1; pertinent excerpts of this report are found in Appendix C of appellee's brief in *Anonymous* v. *Baker*, 360 U. S. 287). A similar investigation in two other counties in New York City revealed an equally sordid picture (N.Y.L.J., December 3 and 4, 1959, editorial page; this report is appendix I of the brief *amicus curiae* in the instant proceeding submitted by the *Co-ordinating Committee on Discipline*).

side at the inquiry at an Additional Special Term of the Supreme Court of the State of New York, Kings County.

Petitioner appeared before the inquiry on two separate occasions, that is, on October 28, 1958 and on May 19, 1959 (R. 22; 28). On both occasions he was represented by counsel (R. 22; 28). In his discretion, the Justice presiding permitted petitioner full representation by counsel at all stages of the proceeding (see *Anonymous* v. *Baker*, 360 U. S. 287 at p. 292). Counsel for the inquiry explained the nature of and authority for the inquiry (R. 23; 31-32). Petitioner and his attorney were informed by the inquiry's counsel and by the court that this was an investigation and not an adversary proceeding (see *Anonymous* v. *Baker*, 360 U. S. 287, 291; *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 479), that there were no respondents or defendants (R. 30; 43), that petitioner was "not being charged with anything" but was to be questioned as to pertinent facts "within the scope of the Inquiry" and which were thought to "bear on or relate to your professional conduct," and also that counsel for the inquiry had "information that indicates your participation in professional misconduct" (R. 32-33).

Counsel for the inquiry then put into evidence the 304 "Statements of Retainer" filed by petitioner and the firm of Cohen & Rothenberg during the years 1954 through 1958 (R. 33-35). Counsel for the inquiry informed petitioner and the court that all these retainer statements were offered in evidence "as a basis for some of the questions to follow" (R. 33). Actually, the record discloses that practically every question asked petitioner had its basis in his own Statements filed with the court.

Petitioner answered a few preliminary questions as to how long and where he had practiced law (R. 22-23, 35-36). About sixty (60) other questions were asked of him during the two days (six months apart) on which he was on the witness stand but, on advice of his counsel, he refused to answer any of them, except questions as to whether he had

failed in any case to comply with Special Rule 3 (R. 43), whether he was familiar with a rule requiring an attorney to maintain records of negligence cases for a stated period of time (R. 42), and whether he maintained a separate office bank account (R. 51).

He stated, as his ground for refusing to answer that "my answer may tend to incriminate or degrade me and may tend to expose me to a penalty or forfeiture" (R. 23 *et seq.*; 36 *et seq.*). On one occasion he added "and I rely on the privileges accorded me under the New York State and Federal Constitutions" (R. 36; and see R. 38).

The unanswered questions related to the identity of his law office partners, associates and employees (R. 24, 36); to his possession of the records of the cases described in his Statements of Retainer (R. 39-40); to any destruction of such records (R. 41); to his bank accounts (R. 40); to his paying police officers (R. 44), court or prison employees (R. 44), or others (specifically mentioned by *name*) for referring claims to him (R. 45); to his paying insurance-company employees for referring cases to him (R. 45); and to his promising to pay any "lay person" ten percent of recoveries or settlements (R. 61).

Petitioner was further asked—and refused to answer—whether he had made or agreed to make such payments to any of several *named* persons (R. 45-47); whether he had hired or paid non-lawyers to arrange settlements of his cases with insurance companies (R. 48); whether his partner Rothenberg had been indicted for and had pleaded guilty to violations of Sections 270-a and 270-d of the New York State Penal Law which forbid solicitation of legal business or the employment by lawyers of such solicitors (R. 49-50); and whether he had knowledge of the claim of a *named* client who had been referred to him by Rothenberg (R. 50-51).

The particular client named was Patrick McCormack, by occupation a guard in the city prison. Petitioner's

Statement of Retainer (R. 48-49; see appendix) shows that petitioner was retained by McCormack on September 4, 1955 in connection with an injury sustained on August 19, 1955. The Statement of Retainer shows that McCormack was referred to petitioner by his law partner Rothenberg. Rothenberg was in jail for "ambulance chasing" at the time of McCormack's injury. He was also in prison at the time he referred the prison guard to petitioner (R. 49).

At one stage of the questioning, counsel for the Inquiry pointedly called to petitioner's attention Section 90 of the Judiciary Law which gives the appellate divisions exclusive and plenary power and control over lawyers and authority to punish professional misconduct or conduct prejudicial to the administration of justice (R. 54). At that time the Inquiry's counsel cited Canon 22 of the Canons of Professional Ethics* requiring lawyers to be candid and frank when before the court; Canons 28 and 29 forbidding the payment of awards to persons bringing in legal business and requiring lawyers knowing of such practices to inform the court thereof; Canon 34 outlawing division of fees except with other lawyers; also Sections 270-a, 270-b, 270-c, 270-d and 276 of the New York State Penal Law, all relating to soliciting and fee-splitting (R. 54-56).

Counsel for the Inquiry warned petitioner and his counsel that "serious consequences" might flow from refusal to answer, albeit he invoked his constitutional privilege (R. 54).

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* The Canons of Professional Ethics are contained in New York State Judiciary Law (McKinney's Book 29, 1948), Appendix, p. 764. In New York, an attorney will be disciplined for violation of these canons. *Matter of Neuman*, 169 App. Div. 638.

Recently the United States Circuit Court of Appeals for the First Circuit reversed an income tax conviction because the prosecuting attorney violated Canon 15 at the trial. *Greenberg* v. *United States*, 29 LW 2023 (C.C.A. 1st Cir., July 12, 1960).

Petitioner's counsel replied that he was relying on *Matter of Grae* (282 N. Y. 428) and *Matter of Ellis* (282 N. Y. 435), as holding that there could not be any "consequences" to lawyers for "doing what they had an absolute legal right to do" (R. 58). Petitioner was given a further opportunity by the court to answer but persisted in his refusal (R. 59-60), all this being admitted in his pleading in this proceeding (R. 61-62).

Thereafter, the Justice presiding at the Judicial Inquiry filed with the Appellate Division a transcript of the proceedings had before him with a recommendation that disciplinary proceedings be instituted against petitioner (R. 17).

The Appellate Division directed this respondent, counsel to the Inquiry, to commence disciplinary proceedings against petitioner (R. 17). In accordance with section 90, subd. 6, of the Judiciary Law, respondent instituted disciplinary proceedings against petitioner by service upon him of an order to show cause and a petition containing the charge against petitioner (R. 5-16). Petitioner's answer admitted all of the factual allegations in the petition (R. 61-62). Thus, there was raised no issue of fact to be tried.

Accordingly, there remained for consideration by the Appellate Division a question of law only which was posed by petitioner in his affirmative defense, namely, that "he was within his legal and constitutional rights and moral prerogative in pleading the privilege against self-incrimination * * * under Article 1, Section 6 of the New York State Constitution," and that, under the circumstances "the imposition of any discipline upon * * * (petitioner) * * * would be a denial to h[illegible] of due process in violation of his rights under the Constitution of the State of New York and under the Fourteenth Amendment of the Constitution of the United States" (R. 61-62).

After submission of briefs and oral argument, the proceeding before the Appellate Division culminated in its order of disbarment dated December 31, 1959 (R. 3). On appeal to the Court of Appeals, this order was affirmed (April 1, 1960).

Summary of Argument

I. Membership in the Bar is a privilege burdened with exacting conditions. The status of one who becomes a member of the Bar is akin to that of a trustee or fiduciary and the conditions of membership in the Bar are continuing and may not be broken after admission to the Bar. If such conditions are broken the privilege to practice law is lost.

Among the conditions imposed upon the lawyer-fiduciary are the duties: to cooperate with the Court in the conduct of a judicial inquiry; to answer relevant questions posed by the Court or by the agency conducting the inquiry on its behalf; and to give an accounting of his stewardship as a lawyer.

The refusal of a lawyer to answer relevant questions, without more, constitutes a breach of those duties, and warrants the taking of disciplinary action against the lawyer.

II. The fact that a lawyer chooses to place his refusal to answer on a claim of his constitutional privilege against self-incrimination does not rob the Court of its power to discipline the lawyer for refusing to answer relevant questions.

The lawyer is not being disciplined for invoking his constitutional privilege but for a breach of his lawyer's duty to speak up. The lawyer like every other citizen, is entitled to invoke the constitutional privilege and the courts must sustain such invocation. This is the full extent of the constitutional guarantee.

However, the lawyer is more than an ordinary citizen; he is a citizen-plus whose duty of forthrightness and candor is as great, if not indeed greater, than that of public employees who are subject to dismissal for lack of candor notwithstanding the plea of the constitutional privilege. (See *Lerner* v. *Casey*, 2 N. Y. 2d 355, aff'd, 357 U. S. 468; *Beilan* v. *Board of Educ.*, 357 U. S. 399; *Nelson* v. *Los Angeles County*, 362 U. S. 1; *Christal* v. *Police Comm.*, 33 Cal. App. 2d 564; *Canteline* v. *McClellan*, 282 N. Y. 166; *McAuliffe* v. *New Bedford*, 155 Mass. 216.)

III. The petitioner was accorded the fullest measure of procedural due process.

The petitioner was not disciplined because he failed to meet undisclosed information from unknown sources. The prime source of information as to petitioner's activities was his own Statements of Retainer filed by him with the Appellate Division. He was disciplined for his refusal to answer relevant questions, based upon information obtained from his own records.

At all times petitioner had the full benefit of counsel. During the course of the inquiry he was fully advised of his duty to answer and of the fact that his refusal to answer might give rise to disciplinary action. In spite of such warnings he persisted in his course of refusal to answer.

Accordingly, the claim that petitioner was deprived of procedural due process is without substance.

POINT I

In a judicial inquiry ordered by the Appellate Division into unethical practices of lawyers, petitioner as an attorney and officer of the court, was under a duty to answer all relevant questions relating to his professional conduct. For a breach of that duty the lawyer is subject to disciplinary action—not by way of punishment, but for the protection of the public, the Bench and the Bar.

"Membership in the Bar is a Privilege Burdened With Conditions."

Settled beyond doubt is the rule that membership in the Bar is not a right but a privilege burdened with continuous and exacting conditions, with particular emphasis upon character and fitness. As Judge Cardozo wrote in *Matter of Rouss*, 221 N. Y. 81, 84-85 (1917):

> "Membership in the Bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards. * * * Whenever the condition is broken, the privilege is lost. To refuse admission to an unworthy applicant is not to punish him for his past offenses. The examination into character, like the examination into learning, is merely a test of fitness. To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime. The examination into character is renewed; and the test of fitness is no longer satisfied. For these reasons courts have repeatedly said that disbarment is not punishment."

Also, as Chief Judge Cardozo affirmed in *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 470-471, a lawyer is "an officer of the court, and like the court itself, an instrument

or agency to advance the ends of justice," and: "Co-operation between court and officer in furtherance of justice is a phrase without reality if the officer may then be silent in the face of a command to speak."

In the case at bar, the Appellate Division and the Court of Appeals emphasized that membership in the legal profession is a *revocable* privilege. Our New York courts followed the rule of this court, that: "There is no vested right in an individual to practice law. Rather there is a right in the Court to protect itself, and hence society, as an instrument of justice" (Vinson, Ch. J., *In re Isserman*, 345 U. S. 286, 289).

Furthermore, the courts of New York have here simply applied their sanction to the standards of conduct for lawyers so eloquently promulgated by this Court: that a lawyer must be imbued with and demonstrate "those qualities of truth-speaking, of a high sense of honor, of granite discretion, *of the strictest observance of fiduciary responsibility*, that have, throughout the centuries, been compendiously described as 'moral character' which 'has been the historic unquestioned prerequisite of fitness' to be a member of the Bar, and that to 'a wide and deep extent, the law depends upon the disciplined standards of the profession and belief in the integrity of the courts'" (Mr. Justice Frankfurter in *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U. S. 232, 247-249). (Emphasis ours.)

Plenary Power of the Court to Supervise and Control the Conduct of Attorneys.

Mindful that membership in the Bar is a *revocable* privilege, we turn to a consideration of the court's power to suprvise and control the conduct of attorneys.

A scholarly review of the history of the far-reaching control possessed by the courts over the conduct of attorneys is narrated by Cardozo, *Ch. J.*, in *Karlin*, *supra*. He

points out (at pp. 471-472) that Section 27 of the New York State Constitution of 1777 provided that all attorneys appointed and licensed to practice shall be "regulated by the rules and orders" of the courts. Particularly relevant to the questions posed by the case at bar is the discussion in *Karlin* of the centuries old procedure in England whereby a barrister was under a duty to answer regarding his professional behavior under penalty of expulsion, pages 472-473:

> "Would the men who framed the Constitution of 1777 have been in doubt for a moment that a rule or order might be made whereby lawyers would be under a duty, when so directed by the court, to give aid by their testimony in uncovering abuses? We find the answer to these questions when we view the history of the profession in its home across the seas.
>
> "* * * If a barrister was suspected of misconduct, the benchers of his inn might inquire of his behavior. *We can hardly doubt that refusal to answer would have been followed by expulsion.* * * * *Short shrift would there have been for the barrister who refused to make answer as to his professional behavior in defiance of the visitors.*"* (Emphasis ours.)

The power of the judiciary to supervise and control the conduct of attorneys is no less plenary today than it was when our system of jurisprudence was first established. That power is not only vested in the Appellate Division by statute (Judiciary Law, Section 90), but it is also inherent in the court (*Matter of Bar Association of the City of New York*, 222 App. Div. 580, 584).**

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* The visitors were the judges who had supervisory control over the inns of court and who exercised this control if the benchers of the inns failed to perform their duties.

** See also opinion of the Appellate Division in the instant case (R. 90-91; 9 A. D. 2d at 439-440).

It is also evident that a preliminary inquiry as to a lawyer's conduct may be made by the court itself or it may appoint someone else for that purpose. Judiciary Law, Section 90, subd. 6; *People ex rel. Karlin* v. *Culkin, supra; Matter of Bar Association of the City of New York, supra; Matter of Brooklyn Bar Association*, 223 App. Div. 149 (2nd Dept. 1928). Here, the Appellate Division directed that the investigation be conducted on its behalf by the Judicial Inquiry. The Supreme Court Justice presiding at the inquiry was directed to hear the evidence and to report his findings and recommendations to the Appellate Division. Thus, the Judicial Inquiry is the *alter ego* of the court. As such, a proper relevant question asked by the Judicial Inquiry is the same as if the question were asked directly by the Appellate Division.

To complement Section 90, the Appellate Division has promulgated Special Rules regulating the conduct of attorneys in its Judicial Department. The genesis of such rules is in previous judicial inquiries. For example, with respect to "negligence cases," Rule 3 requires an attorney to file a statement of retainer setting forth certain prescribed items of information. We specifically mention Rule 3 because the questions that petitioner refused to answer and the records that he refused to produce relate to the very negligence cases for which he was required to file a statement of retainer. In this connection, we again repeat that most of the factual data included in the questions put to petitioner came from petitioner's filed Statements of Retainer.

Basis of Disciplinary Charge Preferred Against Petitioner.

Having demonstrated that membership in the Bar is a privilege burdened with continuous conditions, and that the courts have plenary power to determine whether an attorney has breached one of such conditions, we turn to the charge leveled against petitioner.

Petitioner was charged with professional misconduct, the specification of misconduct being set forth in paragraph 23 of the petition submitted by respondent (R. 15).

Because of petitioner's insistence that he was disciplined for asserting his constitutional privilege, we emphasize the fact that the petition presented to the court by respondent sought to discipline petitioner, not on the ground that he had asserted his constitutional privilege against self-incrimination, but precisely upon the ground (as stated in paragraph 23 of the petition) that his refusal to answer relevant questions and his refusal to produce relevant records "are in disregard and in violation of the inherent duty and obligation of respondent as a member of the legal profession", in that such refusals: (a) are "contrary to the standards of candor and frankness that are required • • • of a lawyer to the Court", (b) are "in defiance of and flout the authority of the Court to inquire into and elicit information within respondent's knowledge relating to his conduct and practices as a lawyer", (c) have "hindered and impeded the Judicial Inquiry" which had been ordered by the Appellate Division, and (d) have resulted in respondent's withholding "vital information bearing upon his conduct, character, fitness, integrity, trust and reliability as a member of the legal profession" (R. 15).

In this context, the Appellate Division plainly stated the issue presented to it (R. 65):

> "Thus, the sole question for our determination is whether the • • • [petitioner], by reason of his refusal to answer relevant questions and to produce relevant records, may be disciplined as a lawyer • • •."

The Appellate Division and the Court of Appeals of the State of New York have both ruled that petitioner laid himself open to discipline when he refused to answer relevant questions and produce relevant records for the information and scrutiny of the Appellate Division in the course of that court's inquiry and investigation.

The Lawyer's Duty to Answer Relevant Questions in a Judicial Inquiry.

It has already been shown that "Membership in the bar is a privilege burdened with conditions" (*Matter of Rouss*, 221 N. Y. 81, 85, *supra*). In affirming the order disbarring petitioner, the Court of Appeals noted that (R. 85):

> "Those conditions must not be arbitrary but the proper and appropriate ones are numerous."

Among other things an attorney cannot solicit retainers or employ others to solicit them for him, or divide his fees with laymen (New York Penal Law, Secs. 270-a, 270-b, 270-c, 270-d, 276). If he knows of such practices by others, he must inform the court (Canon 29) and he must be candid and frank with the court at all times (Canon 22).

That being so, it follows that a lawyer, obviously possessing pertinent information, owes a duty to the Bar and to the court to help expose and uproot such evil practices and corruption at the Bar and in the courts with respect to negligence cases. Manifestly, such duty can be discharged only by candid answers to relevant questions. In the words of the Appellate Division (R. 67-68):

> "Can he [the lawyer], with impunity, disregard the canons of ethics and cast to the winds all inquiries into his professional conduct as a lawyer? Can he disregard his obligation to be frank and candid with the court? Can he negate his duty to cooperate with this court to expose the evil and unethical practices at the Bar and in the courts? Can he refuse to assist this court in its quest to maintain the integrity and morality of the members of the Bar and to maintain the high standards of the legal profession? *We say, emphatically no.*" (Emphasis ours.)

In licensing a person to practice the profession of the law, the court represents to society at large that here

is an honorable man deserving of its trust and confidence—one who is worthy to uphold the honor of the profession and the dignity of the court. When the lawyer, as an officer of the court, refuses to give an accounting of his stewardship, and refuses to answer to the court for his professional practices, then the lawyer loses his "good standing" as an instrument or agency to advance the ends of justice. (See *Theard* v. *United States*, 354 U. S. 278, 281.) Disbarment must follow because the court can no longer represent to the public that the lawyer is worthy of its trust and confidence.* Hence, the courts say that disbarment is not by way of punishment of the individual, but "for the protection of both the court and the public * * * from the official ministration of persons unfit to practice" (*Ex parte Wall*, 107 U. S. 265, 288, 307).

The principle thus enunciated was adopted by the American Bar Association in this language: "The purpose of discipline of lawyers is the protection of the public, the profession and the administration of justice, and not the punishment of the person disciplined."**

Counsel for petitioner indulges in dire predictions with respect to the ruling in this case upon every New York lawyer similarly situated and indeed upon all non-lawyer licensees not here even remotely involved. Such speculation has no bearing upon the problem of whether this particular case offends federal due process. Nor are we here concerned with anyone except a member of the bar—a professional burdened with fiduciary responsibility.

The opinions of the New York courts in this case formulate and enunciate state policy specifically governing the conduct of New York lawyers. The standard of conduct mandated for lawyers is high but no higher than the standard traditionally demanded by our courts down through

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* See also Drinker on "Legal Ethics", pages 35-38.

** 80 A. B. A. Rep. (1955) 470.

the centuries. (See *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465.) The promulgation of such standards by a local state court do not in any sense violate federal due process. The state courts rejected petitioner's contention that he was deprived of due process—and did so upon a rational basis and solid grounds.

When an applicant is admitted to the bar, he is held out and certified by the admitting court as a person in whom the court places its confidence and trust (see Drinker "Legal Ethics", pp. 36, 37 and cases cited). Upon the basis of that representation, clients confide their most precious causes to him. Relying upon the court's certification, clients entrust the lawyer with their most sacred confidences, with the defense of their properties, their liberties and their lives. Clients every day place such trust even in lawyers who are strangers to them and whom they meet for the first time when in difficulty.

In a broader sense, every American lawyer is a trustee of the vast rich heritage of the common law and all that it stands for. Thus, upon admission, in reality a lawyer becomes a trustee. It is for this reason that the courts below spurned the concept that an attorney is a mere licensee of the State, with no higher obligations than a bare licensee, or that the lawyer here has been consigned to the same category as such licensees as bail bondsmen, hairdressers, restaurant owners, morticians, taxicab drivers, merchants, peddlers, and motorists, as urged by our adversaries.

To the contrary, the courts below have simply reaffirmed that the status of an attorney is more akin to that of a trustee or fiduciary and that his obligations and responsibilities are just as sacrosanct, if not more so. That this is the historic view of the exalted status of the lawyer in American society has been uniformly attested to by our courts time and again. (*Schware* v. *Board of Bar Examiners of New Mexico*, 353 U. S. 232, 247; *Matter of Williams*, 158 F. Supp. 279, 280.)

When a trustee or fiduciary is called upon to give an accounting of his stewardship he must do so or forfeit his trusteeship. That is the case here.

In the landmark case of *Meinhard* v. *Salmon*, 249 N. Y. 458, Chief Judge Cardozo spelled out the nature of a trustee's duty in these now famous words:

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate."

Such language is applicable in full force to all those who become trustees of the heritage of the law.

The thrust of petitioner's argument is that he was arbitrarily deprived of the privilege of practicing law. This argument closes its eyes to the record; it is blind and deaf to the profound reasoning and judging contained in the opinions of the courts of New York in this case.

Petitioner was disciplined for the breach of one of the conditions with which the privilege of membership in the Bar is burdened. He was disciplined precisely for refusing to give an accounting of his stewardship as a lawyer; for lack of candor; for breach of his inherent obligation as an officer of the court; and for impeding the inquiry ordered by the court. For these reasons, the courts of New York decreed that he could be steward no longer.

Petitioner's claim that he was arbitrarily disciplined is based upon the notion that no state may constitutionally discipline a lawyer for refusing to answer relevant questions posed by a state judicial inquiry. (See Petitioner's brief, pp. 21, *et seq.*) These are strange words to be spoken by a fiduciary of the public trust.

This court has held that public employees are subject to dismissal for refusing to answer pertinent questions posed by the employer-municipality (*Lerner* v. *Casey*, 2 N. Y. 2d 355, affd. 357 U. S. 468; *Beilan* v. *Board of Educ.*, 357 U. S. 399; *Nelson* v. *Los Angeles County*, 362 U. S. 1; and see *Christal* v. *Police Comm.*, 33 Cal. App. 2d 564; *Canteline* v. *McClellan*, 282 N. Y. 166). The underlying theme of these cases is that the duty of forthrightness attaches to public employment. Simply put, whenever a public employer questions an employee it is entitled to answers, and to honest answers, from its employee. Phrased differently, these cases stand for the proposition that public employment is burdened with conditions, one of the conditions being forthrightness.

Can it reasonably be said that a lawyer's duty of forthrightness to his supervisory court is not as great as that of a public employee to his superior? Has the character of the legal profession sunk to the low level where the duty of candor which an attorney owes the bench, bar and public is not as great as that which a subway conductor (the *Lerner* case) owes to the public? Yet, this is the end result which petitioner's principal argument in this Court would make inevitable.

If, as the courts of New York State with sound reason and abundant precedent have held, the refusal of a lawyer, without more, to answer relevant questions posed by a state judicial inquiry warrants the taking of disciplinary action against the lawyer, the fact that the lawyer may have chosen to place his refusal on a claim of constitutional privilege against self-incrimination does not put the matter in any different posture. As a citizen, he may thus escape possible criminal prosecution. But, as an officer of the court, he may not thus shirk the solemn obligations of his lawyerhood.

POINT II

As a citizen petitioner had the right to invoke the constitutional privilege against self-incrimination. As a lawyer, petitioner was under a duty to answer to the court. Petitioner may not evade the disciplinary consequences for a breach of his duty to speak up as a lawyer by choosing to remain silent under the exercise of his constitutional privilege.

In this Court, as in the New York State courts, petitioner persists in asserting that he was disciplined for invoking his constitutional privilege against self-incrimination. The opinions below belie any such claim.

The Appellate Division, in disbarring petitioner, specifically declared (R. 76-77):

> "To avoid any possible doubt as to our position, we state again that the basis for any disciplinary action by this court is not the fact that respondent has invoked his constitutional privilege against self-incrimination, but rather the fact that he has deliberately refused to co-operate with the court in its efforts to expose unethical practices and in its efforts to determine incidentally whether he had committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition of his retention of the privilege of remaining a member of the Bar."

Petitioner takes the view that the foregoing statement of the Appellate Division is grounded in semantics. This Court has already rejected the "semantics" argument in the cases of *Lerner* v. *Casey*, 357 U. S. 468, *aff'g*, 2 N. Y. 2d 355, *aff'g*, 2 A. D. 2d 1; *Beilan* v. *Board of Education*, 357 U. S. 399; and *Nelson* v. *Los Angeles County*, 362 U. S. 1.

In *Lerner*, petitioner was an employee of the New York City Transit Authority. He refused to answer questions

of his employer based on the exercise of his privilege against self-incrimination. On that premise, Lerner argued that he could not be dismissed. The Appellate Division rejected that contention and upheld Lerner's dismissal for refusal to answer "on whatever grounds" (2 A. D. 2d 355). Chief Judge Conway, who wrote the opinion for the Court of Appeals, reaffirmed the fact that petitioner had not been discharged for invoking the privilege against self-incrimination but for refusing to answer relevant questions concerning his trustworthiness and reliability.

To prove the truth of this statement Chief Judge Conway employed a supposititious example (2 N. Y. 2d at p. 369):

> "It seems to us that it would be more clear if we supposititiously divided the conduct of petitioner into two parts. The first, when he was asked by his employer whether he was then a member of the Communist Party. That question he refused to answer. He then left the room. Certainly by that conduct he would have given evidence of his own untrustworthiness and unreliability. Suppose, then as the second part of his conduct, he returned five minutes later and told the Commissioner of Investigation that he had refused to answer his question because to do so might tend to incriminate him. May not the employer discharge an employee who refuses to answer his proper question? If the petitioner, in the case supposed, had not returned to the Commissioner five minutes later and given a reason for his conduct, we think all would agree that he was properly discharged. Does it change the situation because he returns to say that he refused to answer because to do so might tend to incriminate him? Does that explanation destroy the evidence which he has given to his employer of his untrustworthiness and unreliability as a security risk? Does the explanation *require* that the employer consider without any doubt that the employee by his explanation has again become trustworthy and reliable as a security risk as a matter of law? We think not."

The order of the Court of Appeals in *Lerner* was affirmed by this Court (357 U. S. 468) upon the reasoning that Lerner's dismissal for his refusal to answer "was not destroyed by the claim of the Fifth Amendment privilege because the Commissioner was not required to accept that claim as an adequate explanation of the refusal" (Mr. Justice Harlan at p. 476).

In *Beilan, supra,* a school teacher was dismissed for refusing to answer relevant questions in an inquiry by the Superintendent of Schools. This Court upheld the dismissal stating (357 U. S. at pp. 405-406):

> "By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and co-operation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher."

In *Nelson,* petitioners had been ordered by their employer, the County of Los Angeles, to answer any questions asked of them by a Congressional subcommittee before which they had been subpoenaed. There was a California statute making it the duty of any public employee so subpoenaed to answer any questions as to his membership in any organization advocating the forceful overthrow of the United States government. Petitioners refused to answer any questions on Fifth Amendment grounds and were thereupon discharged from their county employment.

This Court, following *Lerner* and *Beilan, supra,* held that they had been validly separated from their employment not for invoking their constitutional privilege but for insubordination under California law.

Mr. Justice Clark, writing for the majority of this Court, stated that if these men had simply refused without more to answer the subcommittee's questions, the county could

certainly have discharged them, and the fact that they chose to place their refusal on a Fifth Amendment claim put the matter in no different posture since their assertion of that claim was not used as a basis for drawing an inference of guilt. (See, also, *Christal* v. *Police Comm. of San Francisco*, 33 Cal. App. 2d 564, 9 P. 2d 416.)

So here, the petitioner, "an officer of the court, and like the court itself, an instrument * * * of justice" (*People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 470-471) was under an obligation to cooperate with the Appellate Division in its judicial inquiry bearing upon the professional conduct of attorneys by answering the court's relevant questions. Failure to perform that obligation would frustrate the court and render it impotent to perform its statutory and inherent duty to clean up the Bar. Petitioner's refusal to answer such questions constituted a breach of his duty, warranting disciplinary action by the Appellate Division.

Petitioner seeks to escape the impact of *Lerner, Beilan*, and *Nelson* by claiming that the principle of those cases is restricted to cases where a public employee refuses to answer relevant questions posed by his employer. The cardinal principle of those cases cannot be so restricted.

For, the philosophy underlying *Lerner, Beilan* and *Nelson* applies with equal, if not greater, force to the case at bar. The determining factor is that in each of the cases, including the instant one, there is the positive duty to speak up or get out. It matters not whether the relationship is one of public employment so long as "the public interest" is directly involved.

Quick to recognize "the settled distinction between the rights of private citizens and those of public employees" (Petitioner's Brief, p. 35), nevertheless throughout his brief, petitioner professes to perceive no difference in the dual capacity of the citizen-lawyer, when called as a witness in a judicial inquiry by the court.

Can it rationally be said that the duty of an attorney vis-a-vis the court which admitted him and is chargeable with control over his professional conduct, is any less sacred than the duty to the public employer of a subway conductor (the *Lerner* case), a teacher (the *Beilan* case), or a policeman (the *Christal* case)? Is not the duty of the lawyer higher than any of these non-lawyers? And, is the public interest any less vital in the case of the attorney?

In the ultimate, the fundamental principle is the same, namely, that he who refuses to answer when, in the public interest, it is his duty to speak, must bear the consequences.

The Court of Appeals, in affirming the order disbarring petitioner, summed this up in these words:

> "In those cited cases (i.e., *Lerner, Beilan, Nelson and Globe,* and *Christal*) the duty to co-operate in investigations by answering relevant questions was found in statutes or constitutions. The lawyer's duty is found elsewhere—in the common law and in the Canons of Ethics—but it is just as plainly written. In this State a lawyer on admission to the Bar takes the same oath as does a public official (see Judiciary Law, Sec. 466)" (R. 86)

As demonstrated above, the New York Court of Appeals has ruled that the petitioner was not disciplined for having invoked his New York State privilege against self-incrimination (N. Y. Const., Art. I, Sec. 6); that he was disciplined for having refused to answer relevant questions in the judicial inquiry, such conduct having constituted a breach of the condition on which depended his privilege of membership in the Bar (*Matter of Rouss,* 221 N. Y. 81); and that the posture of the matter was not changed by the fact that he chose to place his refusal to answer on a claim of the New York State privilege against self-incrimination.

That aspect of the decision of the New York Court of Appeals, which involves an interpretation of state law and a construction of the State Constitution only, is, we believe, beyond review by this Court.

The Lawyer's Role as a Fiduciary

Reference has already been made to the fact that the status of a lawyer is akin to that of a trustee or fiduciary, charged with "the punctilio of an honor the most sensitive."

Where a court ousts a trustee who refuses to render his account under a plea of constitutional privilege, the trustee's claim of deprivation of due process has no validity; he is ousted precisely because he refuses to perform his duty. To ward off his ousting, the trustee cannot be heard to assert that the beneficiaries must, in the first instance, prove an affirmative case against him. The right to formal accusation and proof, to confrontation and cross-examination of witnesses, is beside the point where there is the absolute positive duty of rendering a true account in the first instance. An attorney-trustee is in no different position.

The New York courts, while readily subscribing to the proposition that invocation of the State constitutional privilege against self-incrimination is the right of every citizen and must be sustained, refused to subscribe to the narrow view that the privilege itself is the sole measure of a lawyer's entire duty or to the categorical conclusion that the exercise of the right, in refusing to answer pertinent questions, can never under any circumstances be a breach of a lawyer's duty to the court.

Conflicting Views as to the Lawyer's Status.

These important considerations point up the fact that the opposing views in this case reflect two conflicting concepts of the role of the lawyer in American society.

In substance, our adversaries urge that if the view of the courts below should prevail, then the lawyer is relegated to second-class citizenship for the reason that he is penalized for pleading the privilege accorded to every citizen.

On the contrary, our courts hold that a lawyer like every other citizen may invoke his privilege, that the courts must sustain such invocation, and that is the full extent and protection of the constitutional guarantee. They take the view, however, that a lawyer is more than a citizen, that he is a citizen-plus; that he has undertaken far higher obligations than an ordinary citizen; that as trustee of a priceless res*—the true administration of justice as the firmest foundation of the republic—he must, when called upon by the very court that admitted him and certified his trustworthiness, and which has plenary supervision over his conduct every moment of his professional life, render a true accounting of his stewardship. Contrary to petitioner's contention, firm insistence by the courts upon the fulfillment of that obligation by the lawyer-trustee strikes no blow at a lawyer's liberty or independence, for he assumed that obligation from the very day of his admission to the Bar.

In striking contrast to the prophecies of petitioner, affirmance of this order of disbarment will have a most salutary and beneficial impact upon the practice of the law

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* This trust res of the lawyer was defined, in his own inimitable way, by Mr. Justice Holmes as,

> "the body of our jurisprudence,—that vast cenotaph shaped on the genius of our race, and by powers greater than the greatest individual, yet to which the least may make their contribution and inscribe it with their names. The glory of lawyers, like that of men of science, is more corporate than individual. Our labor is an endless organic process. The organism whose being is recorded and protected by the law is the undying body of society." (Holmes, Daniel S. Richardson [1890], in Speeches [1913] 46, 47-48.)

in New York State. For if repeated affirmation by our courts that lawyers truly are officers of the court and instruments of justice is not mere rhetorical bombast and a species of semantic indulgence, then lawyers must act and speak out as such and not seek to shirk their solemn obligations as lawyers under the guise of being only plain ordinary citizens.

The standard of conduct for the lawyer cannot be equated to the standard of conduct for the citizen without diminution in stature and loss of prestige for the lawyer. For, if the lawyer is charged with no special duties, no higher obligations, and no more solemn responsibilities above those of the citizen who is not a lawyer, then the law has lost its ideals and the profession can claim nowhere near the lofty status it so proudly professes to hold.

Answers to Other Arguments.

Earlier we recited the fact that petitioner declared in refusing to answer the pertinent questions posed to him, that he was supported in his position by the cases of *Matter of Grae*, 282 N. Y. 428 and *Matter of Ellis*, 282 N. Y. 435. The Court of Appeals has ruled that petitioner has misconstrued the holding in those cases (R. 87). That ruling involves only the interpretation to be placed upon state court decisions and is, therefore, not open to review in this Court.

The fact of the matter is, however, that the difference in the cases is substantial. In *Grae* and *Ellis* the question was whether a lawyer who offered to answer at a judicial inquiry all pertinent questions could be compelled to waive immunity in advance of questioning thereby yielding his constitutional privilege even before interrogation began. Such a waiver would have held the door open for the lawyers' prosecution for crime upon the basis of their own testimony. The holding in each case was that a lawyer,

like every other citizen, is constitutionally privileged not to answer damaging questions.

By contrast, in the present case, petitioner when called upon to testify actually pleaded his constitutional privilege against self-incrimination and was sustained in that plea. He was thus accorded all that the State and Federal Constitutions guarantee and the door was closed to prosecuting him for crime upon the basis of his own testimony.

To implement his argument that the courts of New York acted without solid reason in this case, petitioner attempts to draw an analogy between an attorney's plea of his privilege and an attorney's reliance upon statutes and government departmental regulations forbidding disclosure of confidential communications, in refusing to testify (Brief, pp. 22, 23). Again, petitioner fails to distinguish between a situation where the lawyer has freedom of choice (the voluntary plea of his privilege), and a case where the lawyer has no freedom of choice, for prohibited disclosures are binding upon lawyer and court alike.

Finally, petitioner argues that this Court should not hesitate to hold that New York has acted arbitrarily in disciplining him, since his refusal to testify has not left the State of New York impotent to obtain the information it claims to want from him. He goes on to suggest that the State of New York need only summon him before a grand jury and grant him immunity from criminal prosecution to learn from him all that it desires to know. In aid of that proposition petitioner cites a case which completely demolishes his thesis, namely, the case of *In Re Cioffi*, 21 Misc. 2d 808, *aff'd*, 10 A. D. 2d 425, *aff'd* N.Y.L.J., July 12, 1960 p. 6, col. 3 (New York Court of Appeals).

In *Cioffi*, two attorneys were called before the grand jury and were asked whether they had ever been employed by a certain law firm in Kings County. Notwithstanding the fact that the grand jury had granted them

full immunity from criminal prosecution had they answered the question, they refused to answer, relying on their constitutional privilege against self-incrimination. Instead of obtaining the information he sought, the District Attorney was blocked, as we were, by the attorneys' refusal to answer questions—a situation parallel to that of the instant case.

It is curious that petitioner should rely on *Cioffi* for another reason. Respondent is personally familiar with all the facts which are substantiated by the official court records. Originally, Cioffi and another attorney were called before this judicial inquiry and questioned. They pleaded their privilege. So did seven (7) others in the same law office—five (5) of whom were attorneys. For that reason Mr. Justice Arkwright recommended referral of the cases of all nine (9) to the District Attorney for criminal prosecution or disciplinary proceedings. That is how Cioffi and another came before the grand jury. They repeated their silent performance there.

What is more, in *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 470, Chief Judge Cardozo pointed out that the grand jury inquires into crimes with a view to punishment or correction through the sanctions of the criminal law; that there are many forms of professional misconduct that do not amount to crime; that inquisition by the court with a view to the discipline of its officers is more than a superfluous duplication of inquisition by the grand jury with a view to the punishment of criminals; and that the two fields of action are diverse and independent. Accordingly, which course of several it shall pursue becomes strictly a matter of State policy.

POINT III

Petitioner has been accorded the fullest measure of procedural due process.

There is no substance to petitioner's argument that he was denied procedural due process of law. The fallacy of petitioner's argument is that it is predicated upon charges that do not exist in the case and were never preferred against him. Contrary to petitioner's assertion, he is not being asked to defend himself against unseen informers* and claimed adverse information. As pointed out earlier, most of the questions were based upon facts recited in petitioner's own Statements of Retainer or in official court records. Yet, the single charge against petitioner was his refusal to answer brought about entirely by his own conduct in resisting the judicial inquiry in the area of questioning that related solely to petitioner's professional conduct.

Due process means in essence that every citizen, no matter what his calling, must be accorded fair play. That is the very foundation of our American jurisprudence. It is difficult to conceive how this petitioner was denied any rudiment of due process. We believe that on the issue of due process the record in this case is impregnable.

The record being the best answer to the question of due process, we invite the Court's attention to the following highlights:

1. Petitioner was given ample notice of the hearing before the Judicial Inquiry on October 28, 1958. He was fully apprised of his rights as a witness before the Inquiry as well as of the scope and basis of the Inquiry. Although given full opportunity to answer pertinent questions, he refused to do so (R. 22, *et seq.*).

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* On page 7, *supra*, it is shown that specific persons were *named* when petitioner was being examined.

2. More than six months later—on May 19, 1959, after due notice, petitioner was recalled before the Judicial Inquiry. Prior to his reappearance, both petitioner and his counsel—on May 12, 1959—were furnished with copies of the order of the Appellate Division dated January 21, 1957 establishing the Judicial Inquiry (R. 30, *et seq.*).

3. At the very outset of the hearing, petitioner was again advised in detail as to the purpose, basis and scope of the Inquiry's investigation. Among other things, petitioner was advised that the Inquiry "is not an adversary proceeding" and that "You are not a defendant or a respondent in any sense at this time;" that "You are not now being charged with anything * * * at this time, and the Inquiry at this juncture seeks merely to ascertain pertinent facts from you that are within the scope of the Inquiry and that bear on or relate to your professional conduct" (R. 32-33).

4. Petitioner was also permitted to seek advice of his counsel at any stage of the Inquiry and was also invited to ask any questions or make any statement before proceeding with the questioning (R. 33, *et seq.*).

5. Before the hearing was concluded, petitioner was fully advised of his duty to answer; of the "possible serious consequences that may flow from your refusal to answer"; and that such failure to answer "may well give rise to disciplinary action" (R. 57-58).

6. There followed the preferment of the disciplinary charge, petitioner's answer thereto, submission of briefs and oral argument before the Appellate Division, culminating in the order of disbarment.

In the light of the foregoing, we deem further comment unnecessary. Petitioner was accorded every attribute of due process.

Conclusion

The principle for which we are here contending has an importance that far transcends this particular case. As the Appellate Division observed (R. 65):

> "This question goes to the heart of a serious and far-reaching problem confronting the Bar, the courts and the public. When this question is finally resolved it will affect the standing at the Bar, not only of this * * * [petitioner], but of many other lawyers who similarly have asserted their constitutional privilege against self-incrimination as a basis for refusing to divulge pertinent information with respect to their practices in relation to negligence cases. The resolution of this question will also determine in large measure whether this court's supervisory and regulatory power over lawyers, and whether this court's plenary power to curb all evil and unethical practices in the profession of the law, are to be suppressed and subverted, and whether this court is to be rendered impotent in the performance of its inherent and statutory duties relating to attorneys and to the administration of justice."

Mindful of the gravity of the question that is presented for determination by this Court, we affirm that we do not seek to trespass upon or invade the constitutional right against self-incrimination granted to every citizen, whether or not he be a lawyer. (The record here fully bears out the care and the caution with which we approached the presentation of this important case). The Bar should be ever zealous to protect that right against any encroachment. However, where the assertion of that constitutional right by one who is a lawyer and officer of the court is inconsistent and incompatible with his duty of candor to the court, the lawyer must make a choice. If he deliberately chooses, as is his unquestioned right as a citizen, to assert

his constitutional privilege and thereby remain silent when it is his professional duty to speak out as a lawyer, then he must bear the consequences. For conduct unbecoming an officer of the court, by breach of his special duty as a lawyer, he may no longer remain as a trustee in the administration of justice by the Bench and the Bar.

We respectfully submit, therefore, that this Court, as the nation's supreme guardian of the true administration of justice, should in all respects lend its sanction to this ruling of the courts of New York.

The order of disbarment should be affirmed.

Dated: September 15, 1960.
Brooklyn, N. Y.

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MICHAEL CAPUTO,
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Of counsel.

APPENDIX

To the Clerk of the Appellate Division, Second Judicial Department

This statement as to Retainer is filed pursuant to and in compliance with Rule 3 of the Special Rules regulating the conduct of attorneys and counsellors at law in the Second Judicial Department. *

1. *Date of agreement as to retainer* September 14th, 1955

2. *Terms of compensation* 50% of any amount recovered for damages by suit, settlement or otherwise.

3. *Name and home address of client* PATRICK MC CORMACK, 2800 University Avenue, Bronx 38, New York

4. *Name and office address of attorney* ALBERT MARTIN COHEN, ESQ., 16 Court Street, Brooklyn, New York

5. *Date of occurrence of injury* August 19th, 1955

6. *Place of occurrence of injury* 138th Street & Willow Avenue, Bronx, New York

7. *Title and description of the condemnation or change of grade proceeding*

8. *Date proceeding was commenced*

9. *Number or other designation of the parcels affected*